Supreme Court, U.S.
FILED
DEC 22 1994
OFFICE OF THE CLERK

No. 94-534

In the Supreme Court of the United States

OCTOBER TERM, 1994

ALFREDO OLIVAS, PETITIONER

v.

RICHARD BOEH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

WILLIAM KANTER
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals properly applied *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), when it ruled that respondent, a special agent of the Federal Bureau of Investigation, could not be held in contempt for obeying a Justice Department directive that he not testify in a private civil lawsuit.

2. Whether petitioner's challenge to that ruling is moot in light of the completion of that civil lawsuit more than two years ago.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Davis Enters. v. *United States EPA*, 877 F.2d 1181 (3d Cir. 1989), cert. denied, 493 U.S. 1070 (1990)	6
Murphy v. *Hunt*, 455 U.S. 478 (1982)	8
North Carolina v. *Carr*, 386 F.2d 129 (4th Cir. 1967)	7
Shillitani v. *United States*, 384 U.S. 364 (1966)	7
United States ex rel. Touhy v. *Ragen*, 340 U.S. 462 (1951)	3, 6

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 701 *et seq.*	5, 6
28 U.S.C. 1826(b)	4
28 C.F.R.:	
Sections 16.21-16.22	2
Section 16.22(a)	2, 3, 4, 5
Section 16.28	3
Sections 16.24-16.29	2

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-534

ALFREDO OLIVAS, PETITIONER

v.

RICHARD BOEH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 25 F.3d 761. The opinion of the district court (filed under seal) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1994. A petition for rehearing was denied on July 8, 1994. A petition for writ of certiorari was filed on September 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In February, 1990, members of the Los Angeles Police Department, responding to a robbery of a restaurant, shot four suspects, killing three and critically wounding the fourth. The surviving suspect and relatives of the deceased suspects filed a civil rights action against the City of Los Angeles, the police officers, the chief of police, and other officials. Neither the federal government nor any federal law enforcement officer was a party to that lawsuit. Pet. App. 5a-6a.

Shortly after trial began in January, 1992, the plaintiffs subpoenaed respondent, a Special Agent of the Federal Bureau of Investigation (FBI). Pet. App. 6a, 2b. Respondent had not been present at the robbery, nor had he witnessed any of the events on which the litigation was based. But because respondent had participated in the FBI's criminal investigation of the incident, plaintiffs sought his testimony regarding evidence he had collected and his conclusions about what had occurred at the scene of the shooting. *Id.* at 6a.

The United States Attorney accepted service on behalf of respondent, and referred the subpoena to the Department of Justice (the Department). Pet. App. 6a. Departmental regulations govern demands for testimony and information from its employees in suits to which the federal government is not a party. See 28 C.F.R. 16.21-16.22, 16.24-16.29. The regulations prohibit any Department employee, in response to such a demand, from "disclos[ing] any information or produc[ing] any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official." 28 C.F.R. 16.22(a). The regulations further provide that if the Department has directed the employee

to withhold testimony or information and a court thereafter orders the employee to comply with the demand, the employee "shall * * * respectfully decline to comply with the demand." 28 C.F.R. 16.28. The regulations are based upon this Court's decision in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951). In *Touhy*, the Attorney General, acting under then-extant regulations, instructed an FBI agent not to comply with a subpoena *duces tecum* calling for the production of FBI records in connection with a federal *habeas corpus* proceeding. 340 U.S. at 463-465. This Court held that the FBI agent could not be held in contempt of court for complying with the Attorney General's directive, and that, acting by regulation, "the Attorney General can validly withdraw from his subordinates the power to release departmental papers." *Id.* at 467. *Touhy* left open the question whether the Attorney General may "make a conclusive determination not to produce records" in response to a court's order. *Ibid.*

In this case, after reviewing the subpoena, the "proper Department official" of the Justice Department, 28 C.F.R. 16.22(a), denied permission for respondent to testify. The United States then filed a motion on respondent's behalf to quash the subpoena. Before acting on that motion, the district court ordered respondent to appear *in camera* and answer questions regarding his knowledge of the alleged civil rights violations. Respondent, relying on the directives of his superiors, declined to answer the questions, and the district court held him in civil contempt. The court thereupon denied the motion to quash the subpoena and ordered respondent to testify. When respondent declined to do so, the court again held him in civil contempt. Pet. App. 7a.

Respondent and the United States filed interlocutory appeals under 28 U.S.C. 1826(b), contending that *Touhy* barred the district court from holding respondent in contempt. On February 18, 1992, after hearing the appeals on an expedited basis, the court of appeals issued an order reversing the district court's contempt orders. The court stated that an opinion explaining its order would follow. Pet. App. 5a.

The trial, which had been suspended during the appeal, then resumed. On March 30, 1992, the jury returned special verdicts in favor of the plaintiffs against all defendants remaining at the time of trial, except the City of Los Angeles. Pet. App. 2b-3b. The jury awarded the plaintiffs $44,000 in punitive damages, and the district court later awarded the plaintiffs $378,000 in attorney's fees. *Id.* at 3b, 23b. No party appealed from the judgment.

2. In May, 1994, more than two years after the conclusion of the trial, the court of appeals issued an opinion explaining its 1992 order reversing the district court's orders against respondent. The court held that the case was controlled by *Touhy*, under which an FBI agent could not be held in contempt for obeying a valid departmental directive not to comply with a subpoena. Pet. App. 7a-17a. Although *Touhy* involved a subpoena *duces tecum* and not a subpoena *ad testificandum*, the court found "no difference in principle * * * between the power of the Attorney General to specify what records a subordinate may release and the power to specify what information a subordinate may release through testimony." *Id.* at 13a.

The court of appeals also rejected petitioner's claim that 28 C.F.R. 16.22(a) violated the separation of powers by vesting an executive branch official with the judicial power to determine what evidence would be admitted at a trial. The court explained that it was not interpreting

Section 16.22(a) as establishing "an absolute privilege," or deciding that respondent "may never be required to testify." Pet. App. 9a. Rather, the court stated, it had concluded only that, in light of Section 16.22(a) and *Touhy*, "plaintiffs selected an improper method of attempting to compel [respondent's] testimony." Pet. App. 9a. The court noted that plaintiffs could have called upon the Attorney General or the designated "proper Department official" to justify his or her decision not to permit respondent to testify. That official could then have claimed whatever privileges might shield respondent's testimony, and the court could have ruled on those privileges. The court noted that plaintiffs could also have challenged the Department's decision under the Administrative Procedure Act, or brought a mandamus action to require the Department to grant permission. *Id.* at 9a n.3, 14a. But because the plaintiffs had not taken any of these steps, but instead sought a contempt sanction against a subordinate employee entitled under *Touhy* not to comply with the subpoena, the propriety of the Department's decision to direct respondent not to testify was not properly presented. *Id.* at 9a, 10a.*

ARGUMENT

1. Petitioner claims (Pet. 8-14) that the court of appeals' decision "strips the federal courts of their power to compel evidence," and improperly allows an executive branch agency to usurp that judicial power. In fact, the decision below, which conflicts with the decisions of no other circuit court, faithfully applied this Court's

---

* Judge Norris dissented. He argued that *Touhy* should be limited to subpoenas *duces tecum*. Pet. App. 22a-24a. But see *id.* at 14a-15a (citing cases in which *Touhy* has been held to apply to testimonial subpoenas).

decision in *Touhy* and pointedly stated that where a challenge to a Justice Department directive not to testify was properly made and where no privilege or other basis for not testifying applied, a Department employee could be compelled to testify despite such a directive.

As the court of appeals noted, the narrow issue before it was whether plaintiffs, in seeking respondent's trial testimony, had utilized the proper method to obtain that testimony. Pet. App. 9a. *Touhy* had held that where a departmental policy bars an employee from complying with a subpoena absent the approval of supervisors, holding that employee in contempt is not a valid means of obtaining the materials sought by that subpoena, for "the Attorney General can validly withdraw from his subordinates the power to release department papers." 340 U.S. at 467. Yet that means was precisely the one that petitioner sought to use. As the court below noted, had petitioner made "a direct challenge to the Attorney General's decision to withhold permission" by calling upon the Department official who had directed that respondent not testify to justify that decision, the district court could then have decided whether any valid privileges or other policy considerations existed to shield respondent from testifying. Pet. App. 9a-10a, 15a. Petitioner could also have challenged the Department's directive under the Administrative Procedure Act or through a writ of mandamus. See, *e.g.*, *Davis Enters.* v. *United States EPA*, 877 F.2d 1181 (3d Cir. 1989), cert. denied, 493 U.S. 1070 (1990) (APA review of EPA decision disallowing testimony by agency employees).

The court of appeals thus did not, as petitioner claims, "put [the Justice Department] above and beyond the reach of the courts" (Pet. 9). Instead, as the court emphasized, its decision merely "track[ed] [this] Court's

decision in *Touhy*," Pet. App. 11a, and established no "absolute privilege" not to testify on the part of Department employees who are directed not to do so. *Id.* at 9a. The court's decision is in accord with the decisions of numerous lower courts applying *Touhy* in the context of subpoenas *ad testificandum*. See *id.* at 14a-15a (collecting cases).

Nor, contrary to petitioner's claim, did the court below hold that petitioner "did not have the right[] to subpoena Respondent." Pet. 15. Petitioner surely had that right. But under *Touhy*, petitioner did not have the right, upon the decision of the designated Department official to direct respondent not to comply with his subpoena, to have respondent held in contempt for heeding the command of superiors.

2. Review of the decision below is also unwarranted because petitioner's challenge to that decision is moot. The trial for which respondent's testimony was sought concluded more than two years ago, and no appeals were taken from the outcome of that trial. Because the district court's orders were designed solely to compel respondent to testify in the trial, the completion of the trial mooted the demand for respondent's testimony. See, *e.g.*, *North Carolina* v. *Carr*, 386 F.2d 129, 130-131 (4th Cir. 1967) (per curiam) (validity of civil contempt order against FBI agent, who declined to give testimony pursuant to *Touhy* regulations, mooted by settlement of underlying suit); cf. *Shillitani* v. *United States*, 384 U.S. 364, 370-372 (1966) (civil contempt order against grand jury witness may not be enforced after grand jury has been discharged, for witness "then has no further opportunity to purge himself of contempt"). Moreover, the dispute in this case is not "capable of repetition, yet evading review," because there is no reason to expect that petitioner will require respondent's testimony on

the same subject in any future litigation. See *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam) ("there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur *involving the same complaining party*") (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

WILLIAM KANTER
SCOTT R. MCINTOSH
Attorneys

DECEMBER 1994